

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of ANDREW OWENS and  
ARTHUR OWENS, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ARTHUR OWENS,

Respondent-Appellant,

and

KAYLA WILLIAMS,

Respondent.

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UNPUBLISHED

January 11, 2007

No. 270648

St. Joseph Circuit Court

Family Division

LC No. 05-000990-NA

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from an order terminating his parental rights to the children pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). We reverse.

**I. FACTS**

On October 11, 2005, the mother left the children with Shasta Armstrong, who frequently watched the children, and indicated that she would only be gone for a few hours. The mother did not return for the rest of the evening. Armstrong noticed that the six-month old child's wheezing was getting worse. The emergency room would not treat the baby without permission or a Medicaid card. Armstrong met the police at the mother's home and agreed to take the baby until the mother could be found. Armstrong found the mother the next day and told her about the child's illness. The mother said she was too busy to take him to the doctor. The mother asked Armstrong to take the children, but Armstrong was not in a position to do so. The mother called protective services herself and had the agency take the children. During this time respondent-appellant was incarcerated and awaiting sentencing on firearms and drugs charges.

The mother had several positive drug screens for cocaine and several “no shows” to the Day Reporting Center, a drug-testing site. She was homeless and had been kicked out of a domestic assault shelter because of a conflict with another resident. The children often smelled and when they went to the doctor the day after they came into the care of the Department of Human Services, they both had head lice, respiratory infections and ear infections. According to the mother, respondent-appellant provided for the children before he became incarcerated.

Trial was held on May 5, 2006. Respondent-appellant appeared by speakerphone from Kalamazoo County Jail. His name was not on the children’s birth certificates, but both children carried his name. No affidavit of parentage was filed. The father never received a JC 53 form. The father pleaded guilty to felony possession of a firearm, conspiracy to deliver drugs, and conspiracy to sell guns for drug trafficking. He had a prior criminal record and was hoping for leniency in sentencing by taking the plea. The trial court indicated that it understood that the father was probably the children’s biological father and that the father expressed a desire to care for the children. However, the trial court told the father that he was not entitled to representation without demonstrating that he was the children’s legal father. The trial court intimated that the mother’s attorney and the children’s attorney would likely cover issues “pertinent to both of you.”

The trial court found “from Mr. Owens’ testimony that he is still only a putative father but probably is the biological father.” The father “wanted the Court to believe he did provide for the children when he was out of jail, but he can’t now and probably didn’t before adequately. He just provided some money now and then. He wants his family to see the children, but none are in a position to take the children that are appropriate to care for them.” The trial court terminated the parents’ rights pursuant to MCL 712A.19b(3)(a)(ii), (g) and (j), explaining that “[t]he parents haven’t intended to fail at parenting, but both have conditions in their lives that make it impossible to parent, and their conduct is so unacceptable that they cannot and should not parent Andrew and Arthur Owens. The barriers to parenting are drugs and criminality and lack of parenting skills.”

## II. STANDARD OF REVIEW

Failure of a trial court to allow a father to establish paternity under MCR 3.921 should be reviewed for an abuse of discretion, as the language in the court rule is discretionary. An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made. *Novi v Robert Adell Children’s Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

## III. ANALYSIS

Respondent-appellant raises three issues on appeal, but one is dispositive. He argues that the trial court abused its discretion by not allowing him to establish paternity. We agree. Respondent-appellant was incarcerated when the original petition was filed. The petition alleged that respondent-appellant was the biological father of the children and that he was “in jail for possession of firearms and illegal drugs.” The petition made no mention of where respondent-appellant was incarcerated. Respondent-appellant did not receive notice of the original petition. An order entered following a hearing for which respondent-appellant did not receive notice indicated that “[p]arenting time of father-putative – suspended due to incarceration.”

Respondent-appellant was served in jail with the amended petition seeking permanent custody. He immediately sent the trial court a letter in which respondent-appellant expressed a desire to establish paternity. A JC 53 Notice to Putative Father was allegedly sent to respondent-appellant in jail, but no proof of service can be found in the court file that is dated before respondent-appellant's parental rights were terminated.

Respondent-appellant's only opportunity to appear at a proceeding was the May 5, 2006, termination trial. At that time, respondent-appellant clearly asserted that he was the children's father and that he desired to be a part of their lives. The children had his last name and the mother never disputed paternity. The trial court indicated that it understood that respondent-appellant was probably the children's biological father and that respondent-appellant expressed a desire to care for the children. Based on the trial court's own statements, the evidence demonstrated that it was more likely than not that respondent-appellant was the children's biological father for purposes of MCR 3.921(C)(1). As such, under MCR 3.921(C)(2)(b) "justice requires" that respondent-appellant was allowed 14 days to establish his relationship. Respondent-appellant did not receive his JC 53 form before trial. Additionally, respondent-appellant was incarcerated and was unaware of how to establish paternity. Given the fact that his first ability to appear was at the termination hearing itself, we believe that the trial court should have adjourned the matter in order to allow respondent-appellant to establish paternity. This was not a minor matter. Respondent-appellant's change of status from "putative father" to "legal father" would have affected his rights in a meaningful way—he would have been entitled to court-appointed counsel. It is true that MCR 3.921 is "discretionary" by its use of "may" instead of "shall." Still, the interests of justice required that respondent-appellant be allowed to establish paternity.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Bill Schuette